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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1531

ALBERT JOHNSON, REV. EDDIE MCBRIDE, JOHN FERGUSON, CHARLES CHIPLIN, ISSAC REMBERT, and JAMES ODELL DIXON,

Petitioners,

versus

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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W. Hohfeld, FUNDAMENTAL LEGAL CONCEPTIONS (1919) 16

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No.

ALBERT JOHNSON, REV. EDDIE MCBRIDE, JOHN FERGUSON, CHARLES CHIPLIN, ISSAC REMBERT, and JAMES ODELL DIXON,
Petitioners,

versus

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on January 14, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 488 F.2d 284 and is set forth in the Appendix. The order of the Court of Appeals denying the petition for rehearing and rehearing en banc and the dissenting

opinion of Chief Judge Brown joined by four other judges is unreported and also is set forth in the Appendix. The opinion of the United States District Court for the Southern District of Mississippi is unreported and is included in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 14, 1974. Petitioners' timely petition for a rehearing en banc was denied on March 15, 1974, and this petition is being filed within 90 days of that date. By order of Circuit Judge David W. Dyer, Jr., dated April 1, 1974, the issuance of the mandate of the Court of Appeals was stayed for 30 days to permit filing of this petition. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

Whether under *Georgia* v. *Rachel,* 384 U.S. 780 (1966), petitioners may remove the criminal prosecutions against them to Federal court pursuant to the civil rights removal statute, 28 U.S.C. §1443(1), to protect their exercise of rights specifically protected from official interference by Title I of the Civil Rights Act of 1968, 18 U.S.C. §245(b).

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. §1443(1) provides:

§1443. Civil rights cases

Any of the following civil actions or criminal prosecutions, commenced in a State Court

may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) 'Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons wihin the jurisdiction thereof; . . .

2. 18 U.S.C. § 245(b) (§ 101(a) of the Civil Rights Act of April 11, 1968) provides:

§ 245. Federally protected activities

* * *

(b) Whoever, whether or not acting under color of law, by force or threat of force willfully injuries, intimidates or interferes with, or attempts to injure, intimidate or interfere with —

(2) any person because of his race [or] color, * * * and because he is or has been —

(B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;

(C) applying for or enjoying employment, or any prerequisite thereof, by any private employer or any agency of any

State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;

* * *

(F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition of entertainment which serves the public, or of any other establishment which serves the public and (i) which is located within the premises of which is physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishments: or

* * *

(4) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from —

(A) participating, without discrimination on account of race [or] color, * * * in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2) (A) through (2) (F) or (B) affording another person or class of persons opportunity of protection to so participate; or

(5) any citizen because he is or has been, or in order to intimidate such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race [or] color * * * in any of the benefits or activities described in subparagraphs (1) and (A) through (1) (E) or subparagraphs (2) (A) through (2) (F), or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate —

shall be fined not more than $1,000, or imprisoned not more than one year, or both; and if bodily injury results shall be fined not more than $10,000, or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life.

STATEMENT OF THE CASE

Petitioners are six black residents of Vicksburg, Mississippi, who in March through May, 1972, participated peacefully in speech and peaceful assembly,

through protest marches, demonstrations and a boycott, to eliminate racial discrimination and to publicize the grievances of black citizens of Vicksburg. Determined to end unlawful private and public racial discrimination in their home town of Vicksburg, petitioners helped organize and participated in (1) a primary boycott of local businesses for the purpose of gaining equal treatment and equal employment opportunities in the downtown stores, and (2) peaceful picketing, leafleting, and protest marches protesting racial discrimination in employment and services in city government and its agencies, and to publicize other civil rights grievances, all of which are specifically enumerated in 18 U.S.C. §245(b).

Picketing and leafleting began in late March, 1972, and continued until early May when 49 civil rights demonstrators, including the six petitioners, were forcibly arrested, jailed, and charged not with any violent acts, but under constitutionally vague and overbroad arrest affidavits with criminal restraint of trade and criminal conspiracy in restraint of trade allegedly in violation of Miss. Code Ann. § 97-1-1(f) (1972). Most of the demonstrators, including several of the petitioners, were arrested while picketing and carrying signs protesting racial discrimination, and the remainder were arrested because of their participation in civil rights protest activities.[1]

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[1]The spuriousness and harassing purpose of the charges against the civil rights demonstrators is shown by the fact that prior to the appeal in this case, the grand jury returned no true bills against 43 of the 49 arrested demonstrators (488 F.2d at 285, n. 3). On appeal, the State abandoned its trial court claim that

These arrests broke the back of the civil rights protest movement and ended the picketing. In their verified petition for removal filed pursuant to 28 U.S.C. § 1443(1), petitioners alleged that they were engaged in activities specifically protected from official interference by 18 U.S.C. § 245(b) and that the criminal charges against them have no basis in fact and were brought solely and exclusively for the purpose and effect of interfering, by force and threat of force, with the exercise by petitioners of rights specifically protected against official interference by 18 U.S.C. § 245 (b).[2]

District Judge Harold Cox of the Southern District of Mississippi remanded the cases back to the state court on January 4, 1973. On appeal, the Fifth Circuit recognized (1) that petitioners have a Federally protected right peacefully to engage in civil rights protest activity free from official interference: "At the

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the prosecutions were predicated on Miss. Code Ann. § 97-1-1 (1972), and contrary to the language of the arrest affidavits represented to the Fifth Circuit that the arrests were predicated on Miss. Code Ann. § 97-23-85 (1972) (secondary boycott) and § 97-23-83 (1972) (threats and coercion), but the Record in the trial court is devoid of any direct evidence that any of these petitioners committed any unlawful acts under these statutes.

[2]Simultaneously, the petitioners also sought injunctive relief against the prosecutions in a companion § 1983 action, *Concerned Citizens of Vicksburg* v. *Sills*, Civil No. 72W-18(N) (S.D. Miss. filed May 24, 1972), but the District Court denied temporary injunctive relief which would hold the prosecutions in status quo pending a final hearing (Order of May 26, 1972). A final hearing in that action has not yet been held, and is not part of this appeal.

outset, we note that there is no question of appellants' right to engage in peaceful picketing" (488 F.2d at 286); (2) that petitioners' civil rights protest activity was protected by the civil rights statute invoked: "§ 245 . . . forbids certain forms of harassment such as the bringing of spurious criminal charges" (id. at 287); and (3) that the statutory predicate for removal invoked by petitioners (§245(b)) on its face "clearly deals with equal civil rights" (Id. at 286).

However, the Court of Appeals affirmed the remand order of the District Court, and denied removal, on the ground that the statute invoked does not come within the removal requirement that petitioners must be denied or cannot enforce "a right under any law providing for the equal civil rights of citizens" (§ 1443 (1)):

> "While a variety of acts which interfere with the exercise of civil rights are made criminal by § 245, that statute confers no rights whatsoever. When compared to the 'model' of 1866 cited by the Supreme Court in *Rachel*, and to the laws since held to be within § 1443(1), § 245 cannot be characterized as a law which *provides* for the equal civil rights of citizens." 488 F.2d at 287.

The petition for rehearing was denied by the full court (10-5), Chief Judge John R. Brown joined by four other judges, dissenting on the grounds that:

"First, the issue is of recurring transcendent importance. Second, the panel's decision in my opinion is doubtful if not erroneous.

* * *

"It is my opinion that the panel improperly concluded that § 245 is not a law providing for the equal civil rights of citizens within the meaning of the removal statute. The restrictive interpretation applied to § 245 refuses appellants their "right" to peacefully protest racial discrimination free from the harassment of bad-faith prosecutions inspired by their activities.

> Such a right is, of course, provided for and guaranteed under the First Amendment. While Rachel [Georgia v. Rachel, 384 U.S. 780, 86 S.Ct. 1783, 16 L.Ed.2d 925] teaches that the broad protection afforded all citizens by the Constitution precludes the characterization of any of its provisions as a "law providing for equal civil rights" within the meaning of § 1443(1), § 245(b) (5) nevertheless provides unique, specific protection — phrased in terms of race — for the First Amendment right to protest segregation. Consequently it is a law providing for equal civil rights, satisfying the requirements of the civil rights removal statute.

* * * *

> In both its purpose (preventing unwarranted interference with the exercise of Federally protected equal civil rights) and the scope of its prohibition (against attempted injury, intimidation or interference by force or threat of force) § 245(b) is indistinguishable from the relevant provisions of the 1964 Civil Rights Act held sufficient to support removal jurisdiction in Rachel.

Perkins v. Mississippi, 5 Cir., 1972, 455 F.2d 7, 42-43 (Brown, C.J., dissenting)."

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted Because the Decision of the Court of Appeals Conflicts with, and Seriously Undermines the Protections Afforded the Exercise of Civil Rights By, This Court's Decision in Georgia v. Rachel, 384 U.S. 780 (1966).

This Court in the landmark case of *Georgia* v. *Rachel*, 384 U.S. 780 (1966), and the companion case of *City of Greenwood* v. *Peacock*, 384 U.S. 808 (1966), broadened the scope of civil rights removal protections when it held that removal of criminal prosecutions is justified not only when a black criminal defendant cannot obtain a fair trial in state courts because of a discriminatory state statute affecting procedure which conflicts with some pre-emptive Federal equal civil rights law, cf. *Strauder* v. *West Virgin-*

ia, 100 U.S. 303 (1880), but also when the criminal prosecution itself is instituted and carried through in total disregard of a Federal equal civil rights law which authorizes the black defendant to engage in the activity for which he is being prosecuted and directs Federal courts and officers to protect him in the enjoyment of his Federally-secured equality.

In those cases this Court held that criminal prosecutions may be removed to Federal Court for dismissal when two requirements, both of which are satisfied here, are met: civil rights removal must be sustained when petitioners have shown (1) that "the prosecution stems exclusively from the petitioners' peaceful exercise" of rights (*Peacock*, 384 U.S. at 824) (2) under any Federal law "providing for specific civil rights stated in terms of racial equality" (*Rachel*, 384 U.S. at 792).

In *Peacock* the civil rights demonstrators failed in their removal effort because at the time there was no pre-emptive Federal equal civil rights law providing for specific civil rights stated in terms of racial equality which expressly protected their conduct from official interference. The Court held that the First Amendment rights asserted must be protected by means other than civil rights removal. But in 1968 Congress specifically recognized and sanctioned the importance of civil rights protest as a vehicle for beneficial social change by enacting Title I of the Civil Rights Act of 1968, 18 U.S.C. § 245(b), which specifically prohibits acts or attempts by State officials which injure, intimidate, or interfere with

> "(5) any citizen because he is or has been, or in order to intimidate such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1) (A) through (1) (E) or subparagraphs (2) (A) through (2) (F), or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate —"

and specifically refers to protest of discrimination in employment, private and public (§ 245(b) (2) (C), and in government services (§ 245(b) (2) (B)), the precise goals of petitioners' protest demonstrations.

The Fifth Circuit recognized that both requirements of *Rachel* and *Peacock* were met in this case. That court conceded in its opinion that petitioners had a right to engage in peaceful picketing, that the right to participate lawfully in speech or peaceful assembly opposing any denial of the enumerated rights was specifically protected against official interference by § 245(b) (5), that § 245(b) forbids harassment and intimidation of the rights of civil rights protest conferred by that section including "the bringing of spurious criminal charges," and that the section invoked "clearly deals with equal civil rights."

But the Fifth Circuit seriously misread and came into conflict with this Court's opinions in *Rachel* and *Peacock*, however, when it compared the statute in-

voked here with the statutes enumerated in *Rachel* and *Peacock*, particularly 42 U.S.C. §§ 1981 and 1982, and Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, and determined that those statutes "bestowed" and "granted" specific rights to racial equality, but that § 245(b) as a criminal statute "confers no rights whatsoever."

This Court in *Rachel* specifically guarded against restricting civil rights removal protections to the Reconstruction statutes when it determined that:

> "Congress' choice of the open-ended phrase 'any law providing for . . . equal civil rights' was clearly appropriate to permit removal in cases involving 'a right under' both existing *and future statutes* that provided for equal civil rights.
>
> * * *
>
> On the basis of the historical material that is available, we conclude that the phrase 'any law providing for . . . equal civil rights' must be construed to mean *any law* providing for specific civil rights stated in terms of racial equality" 384 U.S. at 789-90, 792 (emphasis added).

Further, this Court in *Peacock* also warned against limiting the application of civil rights removal exclusively to the statutes invoked in those cases when it advised that:

> "A precise definition of the limitations of the phrase 'any law providing for . . . equal civil rights' in § 1443(1) is not a matter we need pursue to a conclusion . . ." 384 U.S. at 825.

Contrary to the majority of the Court of Appeals, there is nothing in *Rachel* or *Peacock* holding that rights secured by a civil rights criminal statute may not be protected by removal. The case law, the purpose of the statute, and reason are to the contrary. This Court held in the earliest removal cases that a criminal statute punishing racial discrimination in jury selection, Act of March 1, 1875, ch. 114, § 4, 18 Stat. (Pt. 3) 336, now codified as 18 U.S.C. § 243 (and therefore, at least in the United States Code, a companion statute to the one invoked here), provided rights which could be protected by removal of criminal prosecutions in *Gibson* v. *Mississippi*, 162 U.S. 565, 580 (1896); *Neal* v. *Delaware*, 103 U.S. 370, 385-86 (1881); and *Virginia* v. *Rives*, 100 U.S. 313, 321 (1880). See Note, *Federal Jurisdiction: The Civil Rights Removal Statute Revisited*, 1967 Duke L.J. 136, 154, n. 90.

As Chief Judge Brown points out in his dissent, the legislative history of § 245(b) indicates that it was designed for the benefit and protection of civil rights demonstrators:

> "The bill would protect persons who urge or aid participation in the protected activities, as well as those who engage in speech or peaceful assembly opposing denial of the opportunity to so participate." S. Rep. No. 721, 90th Cong., 2d

> Sess., 1968 U.S. Code Cong. & Admin. News, vol. 2, p. 1839.

The legislative history also makes clear, contrary to the holding of the Court of Appeals, that the statute was designed to provide a "right" to be free of interference:

> "H.R. 2516 meets this need [for legislation which spells out clearly what kinds of conduct are prohibited] by spelling out the kinds of activity to be protected, and the bill provides an effective means of deterring and punishing forcible interference with the exercise of Federal *rights*." Id. at 1841 (emphasis added).[3]

And therefore following this Court's analysis in *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 554-58 (1969) (Voting Rights Act), "[i]t is consistent with the broad purpose of the Act to allow the individual citizen standing" (id. at 557) to enforce his rights under it, and to deny such a right clearly frustrates the Congressional purpose.[4]

Simple reason tells us that it makes no sense to dispose of the issue presented "by the panel's sweeping

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[3]This is a typical passage, chosen at random. The notion that the statute is designed to protect the "rights" of black people and civil rights workers and demonstrators appears on almost every page of the Senate Report (majority report).

[4]§ 245(b) was held to create a private right of action to enforce its prohibitions by injunctive relief in *Franceschina* v. *Morgan*, 346 F. Supp. 833, 837 (S.D. Ind. 1972).

but wholly unrevealing wave-of-the-hand declaration" (Brown, C.J., dissenting) that a criminal statute like the one invoked here, providing specific protections to civil rights protest activity, "confers no rights whatsoever." Does this mean that it may be violated with impunity? In our system of jurisprudence, rights are frequently created by prohibitions, particularly in the criminal law, or by the Congressional direction that penalties will be imposed for criminal conduct. For every duty imposed through prohibitory language, there is a correlative right. Thus, without straining language we can say that § 245(b), by imposing on state officials a duty not to interfere with certain forms of civil rights protest activity enumerated in the statute, creates or provides a right on the part of civil rights demonstrators to be free from such interference. See J. Salmond, JURISPRUDENCE, ch. 10, § 72 (7th ed. 1924); J. Bentham, PRINCIPLES OF MORALS AND LEGISLATION, ch. 16, par. 25, pp. 224-25n (Oxford ed. 1879); W. Hohfeld, FUNDAMENTAL LEGAL CONCEPTIONS (1919).

Like the statute invoked in *Rachel*, the equal civil rights statute invoked here both (1) protects petitioners' Federal right to engage in conduct, for example, picketing and persuading shoppers not to patronize discriminatory merchants, which the vague and overbroad provisions of the state statute, generally punishing a conspiracy "to commit any act injurious . . . to public morals, trade or commerce" (Miss.

Code Ann. § 97-1-1(f) (1972)) were interpreted by the arresting officers to proscribe (thus creating a conflict between Federal and state law and substituting a Federal right for a state crime), and (2) provides the further statutory Federal right that state officials should not even attempt to arrest or prosecute petitioners, or otherwise forcibly intimidate or interfere with them, because of their protected conduct.

Although the statute in *Rachel* specifically provided that "No person shall . . . punish or attempt to punish" any person for exercising rights under that statute (§ 2000a-2(c)), § 245(b) by prohibiting acts or attempts to "injure, intimidate, or intefere" with civil rights protest rights employs a more general prohibition against *any* attempted injury, intimidation, or interference, which would include the forcible arrests and incarceration in this case, by any person "whether or not acting under color of law." Literal comparison of the two provisions suggests that § 245(b) is a more, not less, sweeping prohibition of official acts of harassment against equal civil rights than the limited proscription of § 2000a-2(c), since "attempts to punish" are only one means of injuring, intimidating, or interfering. Cf. *Whatley* v. *City of Vidalia*, 399 F.2d 521 (5th Cir. 1968); *North Carolina* v. *Hawkins*, 356 F.2d 559, 562 (4th Cir. 1966) (Sobeloff, J., concurring), cert. denied, 385 U.S. 949 (1966) (42 U.S.C. §§ 1971(a) and 1973i(b)).

II. Certiorari Should Be Granted Because the Decision Below Raises Significant and Recurring Problems Concerning Federal Civil Rights Removal Jurisdiction and Anticipatory Relief to Be Granted Against Pretextual and Spurious Prosecutions for Civil Rights Protest Activity.

The decision of the Court of Appeals raises significant and recurring problems concerning the availability of anticipatory relief against pretextual and spurious prosecutions for civil rights protest activity which should be resolved by this Court. There can be no doubt that the petitioners in this case were arrested and jailed for their peaceful exercise of Federally protected rights of civil rights protest which this Court has recognized in numerous decisions and which are expressly protected by § 245(b), but which continue to be denied in some places in the South. The facts of this case present the all too familiar picture of civil rights demonstrators being arrested on trumped up charges to intimidate and punish them for exercising their right to protest racial discrimination. These prosecutions are somewhat unique only in that they proceed on the theory that a civil rights protest demonstration violates Mississippi anti-trust laws.

Unless the decision of the Court of Appeals is reversed, state officials will remain free to arrest civil rights

demonstrators on trumped up charges, jail them under exhorbitant bonds, possibly subject them to harassment and brutality on the way to jail or in the jail itself, and require them to vindicate their rights only after costly and protracted litigation in the state courts which have not proved sympathetic to Federal claims. Cf. *Perkins* v. *Mississippi*, 455 F.2d 7, 11-61 (Brown, C.J. dissenting), aff'd per curiam en banc, 470 F.2d 1371 (5th Cir. 1972); *Thomas* v. *Mississippi*, 380 U.S. 524 (1965). Since the statute invoked here prohibits any interference with secured rights,

> "It is no answer in these circumstances that the defendants might eventually prevail in the state court. [Footnote omitted] The burden of having to defend the prosecutions is itself the denial of a right explicitly conferred . . ." *Rachel*, supra, 384 U.S. at 805.

In the landmark case of *Georgia* v. *Rachel*, supra, this Court revived civil rights removal jurisdiction under 28 U.S.C. § 1443(1) as an effective remedy for the misuse by the states of their criminal process to punish persons seeking to vindicate their Federally protected rights. If the holding of the majority of the Fifth Circuit that the prosecutions at issue here are not removable is permitted to stand, the decision will eviscerate Federal removal jurisdiction as one of the most effective remedies of the civil rights movement against official lawlessness and repression.

CONCLUSION

For the foregoing reasons, petitioners pray that their petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

Order of the Court of Appeals Denying Petition for Rehearing En Banc and Dissenting Opinion.

Albert JOHNSON et al.,
Petitioners-Appellants,

v.

STATE OF MISSISSIPPI et al.,
Respondents-Appellees.

No. 73-1476.

United States Court of Appeals,
Fifth Circuit.
March 15, 1974.

Appeal from the United States District Court for the Southern District of Mississippi; William Harold Cox, Judge.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion January 14, 1974, 5 Cir., 1974, 488 F.2d 284)

Before GODBOLD, DYER and GEE, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is denied and the Court having been polled at the request of one of the mem-

bers of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also denied.

Before BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, RONEY and GEE, Circuit Judges.

BROWN, Chief Judge, with whom WISDOM, THORNBERRY, GOLDBERG and AINSWORTH, Circuit Judges, join, dissenting;

I dissent to the Court's denial of rehearing en banc for two reasons. First, the issue is of recurring transcendent importance. Second, the panel's decision in my opinion is doubtful if not erroneous.

The question of whether the right of removal, 28 U. S. C. A. § 1443(1), should be denied to those persons seeking redress under 18 U.S.C.A. § 245 is of such moment that it cries out for consideration by the en banc court and should not be disposed of by the panel's sweeping but wholly unrevealing wave-of-the-hand declaration that § 245 "confers no rights whatsoever." This Court has in no prior decision authoritatively resolved the question of whether Congress intended to confer rights upon the victims of conduct which is made a criminal offense under § 245.

It is my opinion that the panel improperly concluded that § 245 is not a law providing for the equal civil rights of citizens within the meaning of the removal statute. The restrictive interpretation applied to § 245 refuses appellants their "right" to peacefully protest racial discrimination free from the harassment of bad-faith prosecutions inspired by their activities.

> Such a right is, of course, provided for and guaranteed under the First Amendment. While *Rachel* [Georgia v. Rachel, 384 U.S. 780, 86 S.Ct. 1783, 16 L.Ed.2d 925] teaches that the broad protection afforded all citizens by the Constitution precludes the characterization of any of its provisions as a "law providing for equal civil rights" within the meaning of § 1443 (1), § 245(b)(5) nevertheless provides unique, specific protection — phrased in terms of race — for the First Amendment right to protest segregration. Consequently it is a law *providing* for *equal* civil rights, satisfying the requirements of the civil rights removal statute.

* * * * * * * *

> In both its purpose (preventing unwarranted interference with the exercise of Federally protected equal civil rights) and the scope of its prohibition (against attempted injury, intimidation or interference by force or threat of force) § 245(b) is indistinguishable from the relevant provisions of the 1964 Civil Rights Act

> held sufficient to support removal jurisdiction in *Rachel.*

Perkins v. Mississippi, 5 Cir., 1972, 455 F.2d 7, 42-43 (Brown, C.J., dissenting).

Furthermore, the panel describes § 245 as exclusively a criminal statute not conferring any substantive rights. This position fails to recognize our Court's policy of according full effect to the remedial objectives inherent in congressional acts which seek to protect disadvantaged persons. Gomez v. Florida State Employment Service, 5 Cir., 1969, 417 F.2d 569, 576; Hall v. Garson, 5 Cir., 1970, 430 F.2d 430; Moreno v. Henckel, 5 Cir., 1970, 431 F.2d 1299.

> "No one can look at the atmosphere in which § 245 and its related parts were enacted without sensing that the whole thrust was a strong, immediate, indignant congressional response to spectacularly violent outrages against Negroes."

Perkins v. Mississippi, 5 Cir., 1972, 470 F.2d 1371, 1373 (Brown, C.J. dissenting).[1]

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[1]Ostensibly *Perkins* may appear to state the law but in reality it is not a precedent, as witness the panel's failure to cite it in the instant case. With petition for rehearing of the en banc decision still pending, the parties settled the whole case. We expressly denied the appellant-plaintiff's motion to vacate and dismiss as moot, but in fact it was moot. Review by the Supreme Court became impossible and under all precedents the case was effectually eradicated so it spawns no legal precedents. Troy State University v. Dickey, 5 Cir., 1968, 402 F.2d 515, 516-517; New Left Educ. Project v. Board of Regents, 5 Cir., 1973, 472 F.2d 218, 221; National Lawyers Guide v. Board of Regents, 5 Cir., 1974, ____ F.2d ____ [No. 73-1623].

The foreboding result which excludes § 245 from the ambit of removal establishes a precedent which will prevent the federal courts from granting relief in future cases of spurious criminal prosecutions against persons protesting racial discrimination. Even worse, this ruling, if it is allowed to stand, leaves a large group of potential victims without effective personal redress for acts which run the gamut of crass, undisguised racial discrimination.[2] It is not confined merely to those pursued by unfounded prosecutions.

It denies history and the temper of Congress in the times giving rise to § 245 to assume that Congress, while on the one hand giving the awesome sanction of criminal law, meant on the other to grant no implied statutory claim to seek redress by damages for the conduct which violates the law. The law was designed to protect the oppressed. It hardly satisfies their needs when the only comfort to be derived is to send the perpetrator to jail and the victim is left without redress for damages directly flowing from the admitted criminal act.

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[2]Section 245 protects voting, voting procedures, running for office, enjoyment of governmental programs, employment by the United States, serving as a juror, attending school, enjoyment of state programs, joining or using a labor union, enjoying the services of inns, hotels, restaurants, encouraging others to protest against discrimination, enjoyment of free speech and public assembly, and many more.

APPENDIX B

Opinion of the Court of Appeals.

Albert JOHNSON et al.,
Petitioners-Appellants,
v.
STATE OF MISSISSIPPI et al,
Respondents-Appellees.

No. 73-1476.

United States Court of Appeals,
Fifth Circuit.
Jan. 14, 1974.

Appeal from the United States District Court for the Southern District of Mississippi.

Before GODBOLD, DYER and GEE, Circuit Judges.

DYER, Circuit Judge:

This is an appeal from the district court's order remanding state criminal prosecutions which appellants had removed to federal court pursuant to 28 U.S.C.A. § 1443(1) and 13 U.S.C.A. § 245(b). Because § 245 is not a law providing for the equal civil rights of citizens within the meaning of the removal statute, we affirm.

Appellants are black citizens of Vicksburg, Mississippi who organized a boycott of local businesses for the purpose of gaining equal employment opportunities

in the privately owned stores and in city government and its agencies, and to publicize other civil rights grievances. Picketing and leafleting began in late March of 1972 and continued until early May of the same year when the forty nine appellants were arrested and charged with criminal restraint of trade and criminal conspiracy in restraint of trade. In an attempt to utilize the removal statute, 28 U.S.C.A. § 1443(1),[1] appellants assert that the Civil Rights Act of 1968, 13 U.S.C.A. § 245,[2] is a pre-emptive statute which granted the right to be free from harassment, such as subjec-

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[1]The relevant provision of 28 U.S.C.A. § 1443(1) reads:

> Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof.

[2]Appellants rely on the following provisions of 18 U.S.C.A. § 245:

> § 245
>
> (b) Whoever, whether or not acting under color of law, by force or threat of force wilfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with —
>
> (1) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from —
>
> * * * * * * * *
>
> (C) applying for or enjoying employment, or any prerequisite thereof, by any agency of the United States, (2) any person because of his race, color, religion or national origin and because he is or has been —
>
> (A) enrolling in or attending any public school or public college;

(B) participating in or enjoying any befenit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;

(C) applying for or enjoying employment, or any prerequisite thereof, by any private employer or any agency or any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;

* * * * * * * *

(F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public and (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishments; or

* * * * * * * *

(4) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from —

(A) participating, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F); or

(B) affording another person or class of persons opportunity or protection to so participate; or

(5) any citizen because he is or has been, or in order to intimidate such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F), or participating lawfully in speech

tion to spurious criminal charges, for having engaged in constitutionally protected activity. Therefore, they assert that they are entitled to have their prosecutions removed from the state court.[3]

At the outset, we note that there is no question of appellants' right to engage in peaceful picketing. Machesky v. Bizzell, 5 Cir. 1969, 414 F.2d 283; Smith v. Grady, 5 Cir. 1969, 411 F.2d 181; Kelly v. Page, 5 Cir. 1964, 335 F.2d 114. Although the state contends that the arrests were predicated not on peaceful protest, but on acts of intimidation and coercion, the question in this appeal is not whether appellants had a constitutional right to engage in the activity for which they are now being prosecuted, but whether they are entitled to invoke the extraordinary protection of the removal statute. The key to removal under § 1443(1) is whether there exists a law "providing for . . . the equal civil rights of citizens." Unlike all previous cases which have interpreted the phrase and which have focused on whether a particular statute meets the "equal civil rights" test, the essential inquiry here is whether § 245, which clearly deals with equal civil rights,

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or peaceful assembly opposing any denial of the opportunity to so participate —
shall be fined not more than $1,000, or imprisoned not more than one year, or both; and if bodily injury results shall be fined not more than $10,000, or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life. . . .

[3]Subsequent to the filing of this appeal, the grand jury returned no true bills in 43 cases, hence only six of the original appellants still have an interest in removal.

meets the requirement that the law be one *providing* such rights.

Our consideration of whether § 245 is within the contemplation of § 1443(1) begins with Georgia v. Rachel, 1966, 384 U.S. 780, 86 S.Ct. 1783, 16 L.Ed.2d 925, in which the Supreme Court gave careful consideration to the legislative history of the removal statute. The Court's conclusion that § 1443(1) encompasses "any law providing for specific civil rights stated in terms of racial equality" must be read in conjunction with the Court's reference to the Civil Rights Act of 1866 as the "model" of a law within the meaning of § 1443(1). The 1866 Act, the substantive provisions of which are now codified as 42 U.S.C.A. § 1981 and § 1982,[4] bestowed certain basic rights regardless of race. The *Rachel* Court concluded that the Civil Rights Act of 1964,[5]

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[4] § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§ 1982 provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

[5] 42 U.S.C.A. § 2000a(a)

> All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section,

which *granted* the right to racially nondiscriminatory service in places of public accommodation, was also within the compass of the removal statute. In explicating the rationale for its determination that the 1964 Act, like the model of 1866, was within § 1443(1), the Court said;

> That Act [the Civil Rights Act of 1964] is clearly a law *conferring* a specific right of racial equality, for . . . *it guarantees* to all the "full and equal enjoyment" of the facilities of any place of public accommodation without discrimination on the ground of race.

Id. at 792-793, 86 S.Ct. at 1790 (emphasis supplied)

Unlike the defendants in *Rachel*, the defendants in City of Greenwood v. Peacock, 1966, 384 U.S. 808, 86 S.Ct. 1800, 16 L.Ed.2d 944, were unsuccessful in their effort to remove their state prosecutions. The Court

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without discrimination or segregation on the ground of race, color, religion, or national origin.

42 U.S.C.A. § 2000a-2

No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 2000a or 2000a-1 of this title, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 2000a or 2000a-1 of this title, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 2000a or 2000a-1 of this title.

in *Peacock* gave two reasons for reaching a result opposite that of *Rachel:*

> First, no federal law confers an absolute right on private citizens — on civil rights advocates, on Negroes, or on anybody else — to obstruct a public street, to contribute to the delinquency of a minor, to drive an automobile without a license, or to bite a policeman. Second, no federal law confers immunity from state prosecution on such charges.

Id. at 826-827, 86 S.Ct. at 1812.

Focusing on the first point, that is, the absence of a federal law which granted a right to engage in acts which would otherwise be in violation of state law, this Court in Whatley v. City of Vidalia, 5 Cir. 1968, 399 F.2d 521, concluded that the Voting Rights Act of 1965 granted the specific civil right found lacking in *Peacock*. Section 11(b) of the 1965 Act, now 42 U.S.C.A. § 1971i(b) specifically forbade any "attempt to intimidate, threatent, or coerce any person for urging or aiding any person to vote or attempt to vote." Although phrased in prohibitory language, the law *created* a new legal right, and was, therefore, held to be one which provides for equal civil rights.

Appellants contend that the proscriptions of § 245 must lead to the same legal conclusion as that reached in *Whatley*. In other words, since § 245, like § 1973i(b), forbids certain forms of harassment such as the bringing of spurious criminal charges, the appel-

lants in the case *sub judice* have a right of removal equivalent to that accorded the appellants in *Whatley*. This argument, however, misses an essential distinction between the two statutes. Unlike § 1973i(b), § 245 is exclusively a criminal statute. While a variety of acts which interfere with the exercise of civil rights are made criminal by § 245, that statute confers no rights whatsoever. When compared to the "model" of 1866 cited by the Supreme Court in *Rachel*, and to the laws since held to be within § 1443(1), § 245 cannot be characterized as a law which *provides* for the equal civil rights of citizens.

Because of our determination that appellants cannot rely on § 245 as a basis for seeking removal, the order of the district court remanding these cases to the state court must be

Affirmed.

APPENDIX C

Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
October Term, 1973

No. 73-1476

D. C. Docket No. 72W-7(C)

ALBERT JOHNSON, ET AL,
Petitioners-Appellants,

versus

STATE OF MISSISSIPPI, ET AL,
Respondents-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

Before GODBOLD, DYER and GEE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed.

Issued as Mandate: January 14, 1974

APPENDIX D

Opinion of the District Court.

Filed: Dec. 29, 1972

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

ALBERT JOHNSON, ET AL
Petitioners

versus Crim. No. 72W-7

STATE OF MISSISSIPPI, ET AL
Respondents

The petitioners are forty-nine persons in Vicksburg in this class action who seek to have various criminal actions removed from the City Court of Vicksburg and from the County Court of Warren County to this Court for a judgment of dismissal. This community has been the object of a boycott by blacks against the white

merchants in Vicksburg because of certain real or imaginary grievances which the black leaders in the community conceive to be unjust and unfair and discriminatory against their race. Basically, the primary complaint of the black community in Vicksburg is as to the fact that there are no blacks in high office in the City Hall. There are black police officers on the police force in Vicksburg, but this is not satisfactory, and the black community has resorted to trade tactics in Vicksburg which they conceive as proper to compel the merchants in Vicksburg to bring pressure upon the official structure of the city to rectify certain inequities and injustices to the black race as to official representation in the official structure of the municipality.

Conferences were held between these warring groups until finally the blacks organized into a body known as "Black Concerned Citizens of Vicksburg" who rejected all overtures to meet and decide their problems with the Vicksburg Chamber of Commerce. Instead, these concerned citizens issued their ultimatum consisting of twelve demands as their price for domestic peace.[1] Finally, on March 25, 1972 these pro-

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[1] 1. Dismissal of Judge Oscar LeBarre; 2. Demotion of Captain Coulter; 3. Impeachment of John Ellis - District Attorney; 4. Discharge of the two (one) white policemen who were responsible for the beating of Mr. Neal Antoine; 5. Hiring 40% Blacks in City Government jobs at all levels; 6. Hiring at least two Black reporters for the city newspaper; 7. Hiring 40% Blacks on Urban Renewal staff at all levels; 8. Restore the name of all previous Black schools; 9. Enforcement of present housing code in the city; 10. Creation of a civilian police review board; 11. End all police harassment of Black people; 12. The immediate release of Lamar Burk and the two juveniles who were arrested on March 23, 1972.

testers inaugurated the practice of picketing the downtown merchants as a means of expression of their disapproval of these economic and political pressures allegedly exerted upon them. The white merchants of Vicksburg were made the object of the boycott which had for its avowed purpose an economic injury to these merchants with whom they actually had no quarrel.[2] Nobody questions the right of anyone of these citizens to peacefully picket and to air their disapproval, or voice their resentment regarding anyone of these objects of their disaffection. But this entire program, like most of its kind, got out of hand, and on May 2 and May 13, 1972 when these pickets began threatening and intimidating other blacks who patronized these white merchants in disregard of these picket lines. These black citizen victims were called "Uncle Toms" and were marked for annoyance and harassment, and even acts of violence on occasions as a result of trading with white merchants of their choice. They were telephoned during the dead of night and played recordings which were designed to frighten and intimidate these black citizens. Criminal statutes in Mississippi have been enacted to prevent unlawful boycotts in restraint

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[2] A secondary boycott involves pressure sought from third parties against a party to a labor dispute that is unlawful at common law. Any kind of boycott, however, is unlawful if executed with force or violence or threats and a conspiracy to that end is likewise unlawful. See Footnote 90, page 934 in 79 CJS; Chapter 323 Mississippi Laws 1942; Cf: *Gulf Coast Building & Construction Trades Council v. F. R. Hoar & Sons, Inc.*, (5CA) 370 F.2d 746.

of trade[3] and to prevent any coercive, or threatening mistreatment of a citizen arising, or growing out of such a program.[4] These local statutes do not in any wise or to any extent impinge upon any federally protected right and are expressly authorized by federal statute.[5]

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[3]Mississippi Code 1942 §2059.2 provides: "If two (2) or more persons conspire to prevent any person from accepting or holding any office, trust, or place of confidence under the State of Mississippi or any subdivision thereof, or to induce any officer of the State of Mississippi or subdivision thereof to leave the place where his duties as an officer are required to be performed and as a means of carrying out the object of such conspiracy, shall cause or attempt to cause, or induce or encourage any individual or individuals to cease doing business with any other person or to cease using, buying, selling, or otherwise dealing in the products of any other person, each of such persons shall be fined upon conviction not more than One Thousand Dollars ($1,000.00), or imprisoned for not more than five (5) years, or both."

[4]Mississippi Code 1942 §2384.5 provides: "If any person shall in any manner threaten with bodily harm, intimidate or coerce another person to prevent said person from lawfully trading or carrying on business, including buying or selling, he shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment for not more than one (1) year in the county jail or be fined not more than One Thousand Dollars ($1,000.00) or both."

That section of the Code is construed in *Rudolph Shields v. State of Mississippi*, 203 So.2d 78 to mean that: "Any words or acts calculated and intended to cause an ordinarily prudent and firm person to fear an injury to his person or property are sufficient, although the person to whom they are directed need not in fact be intimidated."

[5]18 U.S.C. (1964 ed.) §245 provides: "Nothing in this section shall be construed as indicating an intent on the part of Congress to prevent any State, any possession or Commonwealth of the United States, or the District of Columbia, from exercising jurisdiction over any offense over which it would have jurisdiction in the absence of this section, nor shall anything in this section be construed as depriving State and local law

These forty-nine named petitioners and the innumerable parties to this class action who are parties to this conspiracy now seek to have this Court remove these cases pending against them in the police court of Vicksburg, and in the County Court of Warren County to this Court for dismissal here. At the outset, this Court finds as a fact that not one of these petitioners in this case is an officer of the United States, or is acting, or was acting on such occasion of arrest in any capacity as a de jure, or de facto officer, or official of the United States. We are not concerned in this case with the question of the guilt or innocence of these petitioners, or either of them of the crimes with which they are charged. They were not engaged at the time in the discharge, or performance of any federally protected right or activity. 28 U.S.C.A. §1442(a)(1) would authorize any such prosecution of a federal officer or person acting under him to remove any such prosecution to this Court.[6] This petition does not in any wise or to any extent involve the exercise by these petitioners of any federally protected right such as public accommodation, peaceful picket and the like[7].

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enforcement authorities of responsibility for prosecuting acts that may be violations of this section and that are violations of State and local law."

[6]*John T. Willingham, et al v. Daniel Morgan,* 89 S.Ct. 1813.

[7]In *Jessie Hartfield v. State of Mississippi,* (5CA) 367 F.2d 362, the Court heard several cases on motion to remand a criminal removal proceeding, and held that only trespass case number 22,574 should be remanded, but that the case involving parading without a permit, and for picketing various businesses on Capitol Street by parading without a permit and for gathering on the steps of the United States Courthouse after being

The criminal prosecutions in this case arise, or grow out of incidents which occurred in connection with this boycott of white merchants in Vicksburg by these petitioners who call themselves "Concerned Citizens." These petitioners are charged in the state court with the violation of the statutes set forth in footnote 3 and in footnote 4 of this memorandum. Each of these incidents in some wise relate, or grow out of this boycott, or selective buying campaign as petitioners prefer to call it. If this plan and program of these petitioners were as peaceful and as harmless and as innocuous as it is alleged to be, then it would behoove this Court to overrule the motion to remand, and thereupon dismiss this entire proceeding in these state courts. But such are not the facts as found by this Court on live testimony, and on supporting affidavits of the respective parties. These petitioners are before this Court on charges which are violative of the state statutes cited, and this Court finds that there was and is probable cause for their arrest and charge of such offenses. This is not to be understood, or construed in any wise as a finding by this Court of the guilt or innocence of these named petitioners, or the innumerable Negroes as a class who may have been participating in

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requested to leave, and for using loud and boisterous language which disturbed the peace were not removable, and the order of the trial court for remand was affirmed.

Neither the Equal Protection Clause of the Fourteenth Amendment nor any statute confers color of authority on civil rights demonstrators to authorize removal of civil rights prosecutions. Civil rights demonstrators were not acting under color of authority derived from laws providing for equal rights, and were not entitled to have state prosecutions removed to federal courts. *People of New York v. Milton A. Galamison*, (2CA) 342 F.2d 255, certiorari denied 85 S.Ct. 1342.

these unlawful ways in these activities. Everyone of them is presumed by this Court to be innocent of the offense, but they are entitled to all due process rights of a fair and prompt trial of these charges pending against them in these state courts. No informed person would for one moment contend that these petitioners and this class which they represent are not entitled to trade with whom they please, and to publicly acclaim their disaffection for any merchant in business in this locality, but they are only entitled as a matter of right to do that by lawful means, and not by unlawful means in violation of these statutes. These sound principles and well established laws in this Circuit stand out as mountain peaks in our federal jurisprudence. Some stated principles in this connection may be helpful.[8]

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[8]The averments of the petition to remove in this case in their entirety are couched in conclusionary terms. Of such a faulty pleading in *James Brown v. W. B. Rayfield, Chief of Police*, (5CA) 320 F.2d 96, the petitioners averred that all public officials are committed to a policy of segregation by state law; that the judges of the state courts are elected and give tacit and open approval and support to that policy as reflected in the opinions of its courts; and that any resort to state remedies would be futile and result in delay and defeat of the right to the writ; that the freedom rider cases in June 1961 have not yet been disposed of and that such delays are inordinate and defeat the purpose of the writ and that the petitioners' arrest and confinement is patently unconstitutional and in disregard of the laws of the United States, will not entitle an applicant to a writ of habeas corpus. Citing *In Re Wykoff*, 6 R.R.L.R. 793 (5CA); *In Re Wykoff*, 6 R.R.L.R. 794 (S.Ct.).

A conspiracy charge is an elusive one to prosecute, or defend as experience would indicate. In *Southern Christian*

Broad contentions under First Amendment and Due Process Clauses cannot support a claim for removal of state court prosecutions because such contentions do not involve laws providing for equal civil rights. Trespass charges growing out of attempts to get service at places of public accommodation are removable. A removal petition must allege factually that the petitioners will be brought to trial solely as a result of peaceful attempts to obtain service at places of public accommodation. Such action is condemned by the Civil Rights Act of 1964. The petitioners are entitled to have an opportunity to establish in the federal court the fact that they were required to leave the restaurant for racial reasons. *State of Georgia v. Thomas Rachel*, 86 S.Ct. 1783.

A Negro was arrested at a gas service station for disorderly conduct. He simply used the rest room in violation of the owner's wishes. Presley refused to pay for gas which he bought because he said the rest room was not clean. He was loud and had been drinking. A service station is a place of public accommodation. The Court said that probable cause existed for his arrest for disorderly conduct, and that he had not shown that he was being prosecuted for exercising, or

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Leadership Conference, Inc., et al v. A. G. Corporation, 241 So. 2d 619, 625 the Supreme Court of Mississippi as to such a charge said: " 'Private persons cannot conspire to illegally destroy the business of another, and where two or more persons conspire together, the conspiracy makes the wrongful acts of each the joint acts of all of them. Globe & Rutgers Fire Ins. Co. v. Firemen's Fund Ins. Co. et al., 97 Miss. 148, 52 So. 454, 29 L.R.A., N.S., 869; State ex rel. Rice v. Hasson Grocery Co., 177 Miss. 204, 170 So. 234, 107 A.L.R. 663.' 205 Miss. at 375, 38 So.2d at 769."

attempting to exercise any right or privilege secured by the Civil Rights Act of 1964. The petition for removal was remanded and affirmed. *Glynnell Presley v. City of Monticello,* (5CA) 395 F.2d 675.

A prosecution of a Negro for assault with a weapon and carrying a concealed weapon on his person could not be removed to the federal court by a petitioner who had been active in Negro voter registration, and had opposed the political establishment in his parish. That did not amount to violation of due process or false arrest. A showing that rights of the defendant in state prosecutions have been illegally and corruptly denied by state officials prior to trial, or that the charges are false is not sufficient to warrant removal of state prosecutions under the Civil Rights Act. The remand was approved. *State of Louisiana v. Lawrence J. Rouselle, Jr.,* (5CA) 418 F.2d 873.

The United States Supreme Court in the *Peacock* case settled these principles and set the contentions herein projected to rest.[9]

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[9]*City of Greenwood v. Peacock,* 384 U.S. 808, 86 S.Ct. 1800 (1966) holds: (1) That 28 U.S.C. Section 1443(2) only authorizes removals in such cases by federal officers or agents; (2) That Section 1443(1) authorizes a removal on allegation that the prosecution stems *exclusively* from petitioners' peaceful exercise of their right to equal accommodations under the Civil Rights Act of 1964; (3) It is not enough to support removal under Section 1443(1) to allege or show that defendants' federal equal civil rights have been illegally and corruptly denied by administrative officials in advance of trial; that the charges against them are false, or that the defendants are unable to obtain a fair trial in the particular state court. The motives of the officials bringing the charges may be corrupt, but that does not show that the state trial court will find the

The United States Court of Appeals for the Fifth Circuit had a similar situation before it in the *Perkins* case and disposed of it in accordance with the principles stated in the *Peacock* case by the Supreme Court of the United States.[10]

It is the view of this Court from the evidence and supporting testimony that this Court has no jurisdiction of this criminal removal proceeding; that the motion to remand this suit and its accompanying class action to the County Court and to the City Police Court in

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defendants guilty if he is innocent or that he will in any other manner be denied or cannot enforce in the state courts any right under a federal law providing for civil rights. The civil rights removal statute does not require and does not permit the judges of the federal court to put their brethren of the state judiciary on trial. This *Peacock* case is different from the accommodations case of *Rachel;* first, no federal law confers absolute right on private citizens — on civil rights advocates — on Negroes or on anybody else to obstruct a public street, to contribute to the delinquency of a minor, to drive an automobile without a license, or to bite a policeman; second, no federal law confers immunity from state prosecution on such charges.

[10]In *John M. Perkins v. State of Mississippi,* (5CA) 455 F.2d 7, the petitioners had been conducting a boycott at Mendenhall and presumably picketing down there in furtherance thereof, but near Plain and at the Brandon jail in Rankin County they were arrested on various criminal charges which they sought to remove to the Federal court. These cases in this contention to remove were given a full evidentiary hearing, and the motion to remand was sustained. The Fifth Circuit affirmed on the philosophy of the *Peacock* case. The Court specifically called attention to 18 U.S.C.A. §245(a)(1) which says: "Nor shall anything in this section be construed as depriving state and local law enforcement authorities of responsibility for prosecuting acts that may be violations of this section and that are violations of state and local law," etc. Rehearing denied en banc 12-20-72.

Vicksburg should be sustained; and that the petitioners here including all black citizens who describe themselves as "Concerned Citizens," and who have thus participated in this proceeding here, should be assessed with all costs of this proceeding.

A judgment accordingly may be entered within five days as provided by the rules of this Court. A certified or attested copy of that judgment shall be furnished to the County Court of Warren County, Mississippi, and a copy to the Police Court of Vicksburg, Mississippi shall be furnished to them as evidence of the fact that such courts shall thereby be and become reinvested with full jurisdiction of these numerous complaints pending in said courts involving violations of said criminal statutes of the state of Mississippi, and arising or growing out of such boycott, or selective buying program as it may be preferred to be called.
December 29, 1972

/s/ HAROLD COX
UNITED STATES DISTRICT JUDGE